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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 LUCIANO TONELLI,

11 Plaintiff,

12 v.

13 ARLEE ROTHWELL et al.,

14 Defendants.

CASE NO. C12-5751 RJB-JRC

REPORT AND RECOMMENDATION

NOTED FOR:

MARCH 15, 2013

15  
16 The District Court has referred this 42 U.S.C. §1983 civil rights action to the undersigned  
17 Magistrate Judge. The Court's authority for the referral is found in 28 U.S.C. §§ 636(b)(1)(A)  
18 and (B) and Local Magistrate Judges Rules MJR 1, MJR 3, and MJR 4.

19 Defendants filed a notice and statement of death on October 11, 2012 (ECF No. 11).  
20 Plaintiff died on October 7, 2012 (ECF No. 11, Exhibits). The Court recommends denying  
21 dismissal under Fed. R. Civ. P. 25 because the defendants have not shown that they properly  
22 served the notice and statement of death on plaintiff's successor or personal representative.  
23 Defendants state in their notice that they are not aware if there is a personal representative,  
24

1 however, next of kin, plaintiff's mother, was sent the notice pursuant to Fed. R. Civ. P. 25 (ECF  
2 No. 11).

### 3 DISCUSSION

4 Fed. R. Civ. P. 25(a)(1) provides that:

5 If a party dies and the claim is not extinguished, the court may order  
6 substitution of the proper party. A motion for substitution may be made by any  
7 party or by the decedent's successor or representative. If the motion is not made  
within 90 days after **service** of a statement noting the death, the action by or  
against the decedent must be dismissed.

8 *See*, Fed. R. Civ. P. 25. (emphasis added).

9 It has now been over one hundred and twenty-four days since the notice of death was  
10 filed. No motion for substitution of a party has been made.

11 The Court must first determine if plaintiff's cause of action survives his death. This  
12 action involves a claim for interference with medical care. Plaintiff alleges that he had a medical  
13 order that he be placed in a lower bunk and that defendant Rothwell assigned him to an upper  
14 bunk. Plaintiff alleges that he fell from the upper bunk and was injured (ECF No. 4, complaint).  
15 A civil rights action for denial of medical care does survive the plaintiff's death. *Pinon v. State of*  
16 *Wisconsin*, 368 F. Supp 608, 610 (Mother could maintain a civil rights action for denial of  
17 medical care for deceased son).

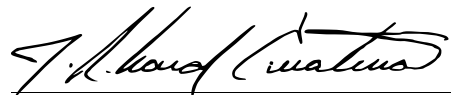
18 Pursuant to Fed. R. Civ. P. 25, a case must be dismissed 90 days after service of the  
19 notice on the decedent's successor or representative. But for a Fed. R. Civ. P. 25(a) notice of  
20 death to be valid, the notice had to be properly served. *See* Fed. R. Civ. P. 25(3); *See also*,  
21 *Hilsabeck v. Lane Co., Inc.*, 168 F.R.D. 313, 314 (D. Kan. 1996). Defendants do not inform the  
22 Court that they properly served the notice of death. They state "[t]his statement is being provided  
23 to the Court pursuant to Fed. R. Civ. P. 25 and is being sent to the emergency contact  
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1 information Mr. Tonelli provided to the Department – specifically his mother. It is unknown if  
2 Mr. Tonelli’s estate has a personal representative at this time.” (ECF No. 11). Mailing a copy of  
3 the notice does not constitute proper service. Because the Court does not know if the notice was  
4 properly served, the Court recommends denying dismissal without prejudice.

5 Defendants may re-note a motion to dismiss and show that they have properly served  
6 their notice. Alternatively, if nothing is filed, nine months from entry of the Court’s order on this  
7 Report and Recommendation the case will be subject to dismissal pursuant to Local Rule 41(b).

8 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), defendants shall have  
9 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.  
10 6. There is no plaintiff currently before the court who could file an objection. Failure to file  
11 objections will result in a waiver of those objections for purposes of de novo review by the  
12 district judge. *See* 28 U.S.C. § 63(b)(1)(C). Accommodating the time limit imposed by Fed. R.  
13 Civ. P. 72(b), the clerk is directed to set the matter for consideration on March 15, 2013, as noted  
14 in the caption.

15 Dated this 13<sup>th</sup> day of February, 2013.

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18 J. Richard Creatura  
19 United States Magistrate Judge  
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